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Terms: R on the application of Sienkiewicz v South Somerset District Council 2013

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Judgments

QBD, ADMINISTRATIVE COURT

Neutral Citation Number: [2013] EWHC 4090 (Admin)

Case No: CO/8296/2013

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/12/2013

Before :

MR JUSTICE LEWIS

- -

Between :

R (on the application of) TERESA SIENKIEWICZ	**Claimant**
- and -	
SOUTH SOMERSET DISTRICT COUNCIL	**Defendant**
- and -	
PROBIOTICS INTERNATIONAL LIMITED	**Interested Party**

- -

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

- -

Gregory Jones QC and Sarah Sackman (instructed by **James Smith Planning**) for the **Claimant**

Stephen Whale (instructed by **South Somerset District Council**) for the **Defendant**

Hearing date: 9th December 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Lewis

Judgment

As Approved by the Court

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Mr Justice Lewis :

INTRODUCTION1. This is a claim for judicial review of a decision of the Defendant, the local planning authority, granting planning permission to the Interested Party, Probiotics International Limited ("Probiotics") for the erection of a building for B1, B2 and B8 uses with associated infrastructure, parking and landscaping on land forming part of the former Lopenhead Nursery ("the application site") in Lopenhead, South Somerset. Frances Patterson Q.C. (as she then was) ordered that the application for permission to apply for judicial review be considered at an oral hearing with the hearing itself to follow immediately after if permission were granted.

BACKGROUND

The Application

2. The application site covers an area of approximately 0.69 hectares and contains a large derelict greenhouse, a mobile phone mast and a large earth mound. It forms part of what was the former Lopenhead nursery.

3. Part of the former nursery is allocated for employment use under the South Somerset Local Plan ("the Local Plan") which forms part of the Defendant's statutory development plan. That part of the former nursery is divided into four plots. Industrial buildings have been constructed and are now used by Probiotics for the production of human and animal health care products on two of those plots.

4. The application site itself falls outside the area of the former nursery which is allocated for employment use under the Local Plan. Probiotics wished to expand its operations and to erect, and operate from, another building on the application site (but outside the area allocated for employment use). The business reasons why Probiotics wish to do so were that its operations had grown significantly in recent years. It needed to expand its production facilities, storage and office infrastructure and it wished to separate the production of human from animal health care products.

5. Prior to the application being considered, the Council considered whether or not the proposed development fell within the definition of "EIA development" in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations") in which case the application needed to be accompanied by an environmental statement. In broad terms, development will be EIA development if either (1) it falls within one of the categories of development listed in Schedule 1 to the EIA Regulations or (2) it falls within one of the categories listed in Schedule 2 to the EIA Regulations and is likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

6. On 6 February 2012, the Council issued a screening opinion indicating that although the development fell within one of the descriptions in Schedule 2 it was not likely to have significant environmental impacts. It

concluded therefore that the proposed development was not EIA development and an environmental statement was not required. The Claimant requested the Secretary of State to give a direction on whether the proposed development was EIA development. By letter dated 13 April 2012, the Secretary of State gave a direction that the development was not EIA development. He considered that it did not fall within Schedule 1 to the EIA Regulations and, although it fell within Schedule 2, the proposed development would not be likely to have significant environmental effects. He was asked to reconsider the matter. He sought further information including, in particular information on whether the manufacture of the products involved the use of chemical conversion processes. That was relevant as installations manufacturing products using such processes fall within paragraph 6 of Schedule 1 to the EIA Regulations and would be EIA development and an environmental statement would be required to be submitted with an application for planning permission. Having received information from Probiotics' planning consultant on 13 June 2012, the Secretary of State determined that the application did not fall within paragraph 6 of Schedule 1 to the EIA for the reasons set out in his letter of 31 August 2012. He decided that there was no reason to reconsider the earlier direction that the application for planning permission was not EIA development.

The Report

7. The application was considered by the relevant committee who had a report from officers. That report set out a description of the site and the proposed development. It set out the planning history of the site. The report then turned to the relevant policies and expressly referred to and summarised the effect of section 38 (6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), that is that decisions must be made in accordance with the development plan unless material considerations indicate otherwise. The report referred to the development plan, and in particular the relevant policies contained in the Local Plan. It referred to national policy and, in particular, to the National Planning Policy Framework ("the Framework"). That Framework is not part of the development plan but it is a material consideration.

8. The report summarised the responses to the consultations and the objections that had been made to the grant of planning permission by, amongst others, the local parish councils, the Campaign to Protect Rural England and individuals. The report noted the comments of others including the Defendant's landscape officer. He had no objection in principle to the extension of employment use over this part of the former nursery and made detailed comments explaining why the negative impact of the proposed building would not be so great that it could not be dealt with by way of planting trees and other measures to mitigate its effect. The Defendant's economic officer also commented. He considered that the fact that a manufacturing business was looking to develop their business was a positive feature. The report also summarised the comments from other officers and agencies. The report then addressed the question of whether or not planning permission should be granted. First it considered the need for development and said this;

"The applicant has outlined within the supporting documents the reasons for the additional building. Probiotics relocated their business to the adjacent allocated employment site in early 2010, having moved from premises at Stoke Sub Hamdon. The company has grown significantly in recent years and exports to over 50 countries. It is now looking to increase their current production facilities, storage and office infrastructure in order to meet the needs of a growing business.

The additional building will provide additional production space to enable the manufacturing of animal welfare products to be separated from human welfare products. The agent has outlined that 'export controls within the industry require that human and animal welfare products are both manufactured and stored in separate buildings'. It is important to stress that there is no legal requirement for the products to be manufactured and stored in different premises. However, from a business perspective, the company wishes to grow its export business and the separation of the animal from human products is driven on ethical grounds. A number of those countries/customers will seek the total separation for the human and animal products.

Moreover, the development will provide significantly more site storage of their goods and to satisfy the need for additional office accommodation. The company presently employ 80 people (includes 15 sales people who are rarely on site) with an expected increase to 130 by 2015. Based on this information, it is apparent that, despite the general poor state of the economy over the last few years, the company is performing very well and is expanding at an increasing rate. Allied to the fact that there is a business case to separate the animal and human manufacturing processes, it is considered that there is a need for an additional building. The officer has asked the MD about the need for the building and whether the extra capacity required could be accommodated either within the 2 existing buildings, via an extension to the buildings or within land still available on the allocated employment site. The clear response was that these options were not acceptable either in providing the physical capacity required or to provide the separate buildings required for the human and animal products. In addition, it is not considered that the company are building this 3rd facility as a speculative form of development. It is costly to construct such a building and it is not considered that the company would be seeking consent if there were other cheaper or more practical solutions."

9. Then it considered whether the proposed development was acceptable in planning terms. First, it considered that the proposal would have a positive economic impact by increasing the number of employees (from about 80, 65 of which were based at the Lopenhead Nursery site, to about 130). It noted that the Framework supported growth in rural areas in order to create jobs. Next, the report considered the environmental impact. It considered the impact on the landscape and, for a variety of reasons, concluded that the visual impact was not considered to be significantly harmful. The report considered the wider sustainability issues in terms of accessibility to services, facilities and the fact that public transport links serving the site were poor and travel by private vehicle was likely. The report set out a number of reasons why permission should not be refused on sustainability issues. It then referred to the Council's screening opinion and the Secretary of State's direction that the proposed development was not EIA development and attached the two letters from the Secretary of State. The report noted that the view of the Council remained that the proposed development was not EIA development. The report considered the availability of other sites. It then considered landscaping and design and said this:

"Associated with the scale of the development, it is considered that, whilst SSLP policy ME4 supports the expansion of businesses in the countryside, and that this development would meet the various criteria outlined under this policy, it is more difficult to accept that this constitutes a small scale expansion of the existing business. However, it is considered that this policy is now superseded by the policy support contained in the NPPF for the expansion of all types of business in rural areas."

10. The report then dealt with highways, parking, the environmental impact assessments and other issues. In that regard, the report said this:

"Following on from the last point, it is considered that if the application was for general outline consent with no identified end users, then it could rightly be treated as speculative and to all intents and purposes as a strategic employment site. This was the case with the application for outline consent submitted in 2009 which included the current application site and land to the front of the site. Third parties have correctly referred to this earlier application. This was withdrawn as it was considered premature as other plots were available on the allocated site and would have been refused. As this current application is for an identified end user and 2 additional plots have subsequently been developed on the allocated site, and plot B is not available to the applicant, it is a fundamentally different application to the earlier outline application. In addition, the NPPF has now been introduced with its support for economic growth in rural areas.

The site is located on Grade 1 agricultural land. Objections have been raised that this will remove land from agricultural use and this is contrary to national and local policies that seek to protect such quality agricultural land. It is accepted that this application will result in the loss of prime agricultural land. However, given the fact that it has been disused for a number of years, the small area of land involved and given its physical orientation sandwiched between employment uses and residential properties thus questioning whether it would actually be used for agricultural purposes, it is not considered that the application should be refused on the basis of a loss of Grade 1 agricultural land."

11. The conclusion is in the following terms:

"It is fully acknowledged that there are a number of valid planning concerns about this proposal. However, for the reasons outlined in the report above, it is considered that the application is in accordance with the NPPF and is recommended for approval. The views of third parties have been carefully assessed and taken into account by the case officer and a number of consultees. However, for the reasons given above, it is not considered that the impacts of the development are so adverse that they significantly and demonstrably outweigh the benefits of the scheme."

12. The report therefore recommended the grant of planning permission.

13. On 17 April 2013, the Claimant's solicitor sought to access the committee report on the Council's website but he was unable to obtain a legible version of the report. He e-mailed a planning officer at the Council and was sent an electronic version of the report at 16.44 on 19 April 2013.

14. On 24 April 2013, the Claimant's solicitor wrote a four-page letter repeating objections made previously.

The Grant of Planning Permission

15. The matter was considered by the relevant Council committee on 24 April 2013. The Claimant's solicitor attended the meeting and requested that the matter be deferred as he wanted his letter of 24 April 2013

circulated in full. He also made observations about the application. The committee decided they would not defer consideration of the matter. There was a short debate during which several members expressed their support for the proposal. They resolved to accept the officer's recommendation and grant planning permission. It can be inferred that the committee adopted the reasoning in the officers' report. On the 30 April 2013, planning permission was issued. The notice sets out the summary of reasons for granting the permission in the following terms:

"The proposed development by reason of its design, scale, siting and materials, is considered to respect the character and appearance of the area, will provide employment opportunities, will provide a satisfactory means of vehicular access and will also provide a satisfactory landscaping scheme. It is also considered that there is adequate justification to allow an expansion of Probiotics on land outside of the allocated employment site. The scheme accords with Policy ST5, ST6 and EC3 of the South Somerset Local Plan, Policy 49 of the Somerset and Exmoor National Park Joint Structure Plan Review and to policy in the NPPF."

16. There were a number of conditions attached. For present purposes, the relevant one is condition 8 which is in these terms:

"The building hereby permitted shall only be carried out by Probiotics International Ltd (or any successor company) during its occupation of the land subject to this permission.

Reason: The Local Planning Authority wishes to control the uses on this site to accord with the NPPF. "

LEGAL FRAMEWORK

17. Planning permission is required for development including, as here, the erection of a building and the making of a material change of use of land: see section 57 of the Town and Country Planning Act 1990 ("the 1990 Act").

18. Section 70(1) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that a local planning authority:

"(a) ... grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) ... refuse permission".

19. Section 70 (2) of the 1990 Act provides that where an application for planning permission is made to a local planning authority, then:

"(2) In dealing with such an application the authority shall have regard to

(a) the provisions of the development plan, so far as material to the application,

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations."

20. The development plan is defined in section 38(3) of the 2004 Act. Further, section 38(6) of that Act provides that:

"(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

21. The development plan in the present case included certain saved polices contained in the South Somerset Local Plan ("the Local Plan"). For present purposes the relevant policies include ME/LOPE/1. That allocates land at Lopenhead Nursery amounting to 1.8 hectares for employment use. The application site, however, does not fall within that area of land and is not allocated for employment use. The next significant relevant policy is Local Plan Policy ME4. That provides that:

"Proposals for the small scale expansion of existing businesses (classes B1, B2 and B8 of the use classes order) outside defined development areas shown on the proposals map will be permitted provided that they satisfactorily meet the following criteria..."

22. A list of criteria is then set out. Furthermore, Policy ST3 also provides that development outside defined

development areas of towns, rural centres and villages will be strictly controlled and restricted to that which benefits economic activity, maintains or enhances the environment and does not foster growth in the need to travel. Policy ST5 provides that proposals for development are to be considered against certain specified criteria. Policy ST6 provides that proposals for development which is otherwise acceptable in principle will be permitted if certain specified design criteria are met.

23. The Framework sets out the government's planning policies for England. The Framework is a material consideration to which the Defendant must have regard in considering applications for planning permission.

THE ISSUES

24. The Claimant seeks to challenge the grant of planning permission on five grounds. The grounds raise the following issues:

(1) Did the Defendant adopt an unlawful approach to the consideration of the application for planning permission in that the Defendant failed to recognise the primacy of the development plan and considered that the Framework had superseded or replaced the relevant provisions of the development plan (ground 2)?

(2) Was condition 8 limiting the permission to Probiotics (or a successor company) unlawful because it was ambiguous and unenforceable, or irrational or did not fairly and reasonably relate to the development (ground 1)?

(3) Did the Defendant fail to give adequate reasons for the grant of planning permission (ground 3)?

(4) Did the Defendant breach the EIA Regulations by granting planning permission without requiring the submission of an environmental statement pursuant to the EIA Regulations (ground 4)?

(5) Was there a failure to comply with the requirements of section 100B of the Local Government Act 1972 ("the LGA") or the requirements of procedural fairness (ground 5)?

GROUND 2 - THE APPROACH OF THE DEFENDANT

25. I consider first ground 2 and whether the Defendant adopted an unlawful approach to the grant of planning permission. The Claimant contends that the Defendant failed to recognise the primacy of the development plan and assumed, wrongly, that the Framework superseded the relevant policies contained in the development plan.

26. First, in general terms, one could expect a planning officer or an experienced planning committee to be familiar with the basic principles underlying section 38(6) of the 2004 Act, namely that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. Furthermore, in the present case, the report to committee expressly referred to section 38(6) of the 2004 Act and summarised its effect. In addition, the structure and content of the report clearly reflects a careful consideration of the relevant development plan policies and other material considerations, such as the Framework. In my judgment, the committee would therefore have been well aware of the provisions of section 38(6) of the 2004 Act and the need to determine the application in accordance with the development plan unless material considerations indicated otherwise.

27. Secondly, the report itself, read as a whole, and in context, makes it clear that the proposed development would conflict with the development plan. The allocation site was not in the area of Lopenhead nursery allocated for employment use. Development in rural areas would otherwise be restricted. Furthermore, as the discussion of Local Plan Policy ME4 makes clear, the development would not meet the requirements of that policy as the proposed development would not involve "small scale expansion". In my judgment, therefore, the report (and by implication the Committee) were well aware that planning permission would be refused, in accordance with the development plan, unless material considerations indicated otherwise. Mr Whale for the Council submitted, correctly, that conflict with one or more particular policies in the development plan does not necessarily mean that the proposal is not in accordance with the development plan as a whole. That may be the case, for example, when policies point in different directions. In the present case, however, all the development plan policies to which reference was made indicate that the proposed development on this site (i.e. large scale business expansion in a rural area) would not be permitted. In my judgment, the report proceeds on the basis that the proposed development would not be permitted applying the provisions of the development plan alone.

28. For that reason, the report does go on to consider material considerations which might justify the grant of permission. In particular, the Framework supported the expansion of all types of business in rural areas. In

other words, the approach in Policy ME4 of only permitting expansion in rural areas if they were "small scale" was not the approach adopted by the Framework. The Framework would support the grant of planning permission for even a large scale expansion of a business in a rural area assuming, of course, that any adverse effects of the proposed development were considered acceptable and the proposed development was otherwise acceptable in planning terms. That approach appears, for example, from paragraph 28 of the Framework which says planning policies should support economic growth in rural areas in order to create jobs and prosperity. That policy would, in my judgment, be a material consideration which is capable in principle of justifying the grant of planning permission.

29. Mr Jones QC submits that the report erred by stating that the Framework "superseded" the policies in the development plan. It is correct that the Framework cannot change the development plan. The Framework is, however, a material consideration and may provide the reasons why an application for planning permission should be granted notwithstanding the development plan. Furthermore, the provisions of a development plan may become outdated as national policy changes, or particular development plan policies may no longer meet current needs, or other changes may have occurred which make the particular provisions of the development plan less relevant. In such circumstances, other material considerations, such as more recent national policies, may assume greater importance and indicate that the application for planning permission should be approved (see the comments of Lord Hope of Craighead in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at 1450B-E). In my judgment, read as a whole and in context, the report was merely saying that the approach of permitting only small-scale development in rural areas was no longer up to date as the Framework recognised that it may be appropriate to support business expansion more generally. The report then goes on to consider whether or not permitting a larger scale business expansion would be acceptable in planning terms. That is a lawful approach. The committee would have understood that to be the approach set out in the report and, given that they resolved to accept the recommendation, it can be inferred that they adopted that approach.

30. The Claimant also submitted that the Council should have consulted the Secretary of State pursuant to Article 9 of the Town and Country Planning (Consultation) (England) Direction 2009 ("the Direction") before granting planning permission. That article provides that where a local planning authority in England does not propose to refuse an application for planning permission to which the Direction applies, it shall consult the Secretary of State. The material provision is Article 5 of the Direction which provides:

"For the purposes of this direction, "development outside town centres" means development which consists of or includes retail, leisure or office use, and which -

(a) is to be carried out on land which is edge-of-centre, out-of-centre or out-of-town; and

(b) is not in accordance with one or more provisions of the development plan in force in relation to the area in which the development is to be carried out; and

(c) consists of or includes the provision of a building or buildings where the floor space to be created by the development is:

(i) 5,000 square metres or more; or

(ii) Extensions or new development of 2,500 square metres or more which, when aggregated with existing floor space, would exceed 5,000 square metres."

31. The Claimant submits that the proposed development includes office use which meets the criteria in Article 5(1)(a) and (b). She also submits that the area of the floor space of the proposed development exceeds 2,500 square metres and taken together with the existing floor space of the existing Probiotics developments on the nursery site, the total floor space exceeds 5,000 square metres so that Article 5(1)(c) is met. In calculating the relevant floor space, the Claimant submits that Article 5(1)(c) requires the entire floor space of the proposed development (whether or not intended to be used for office use) has to be aggregated with the other areas on the nursery site which are used by Probiotics. Furthermore, she submits, it is not just the area of the rest of the former nursery site occupied by Probiotics which is actually used for office use which is to be included in the calculation. Rather it is the floor space of the entire area for which planning permission has been granted. That entire area could be used for office use even if it is not being used for that purpose at present.

32. I understand the argument that Article 5(1)(c) deals with "the floor space to be created by the development" and is not expressly limited to the floor space intended to be used for office use. But without ruling on whether that interpretation of Article 5(1)(c) is correct, as a minimum, in my judgment, Article 5(2) is looking at the area of existing floor space in another development which is actually used for office purposes.

The calculation is to include "retail, leisure or office floor space". That is consistent with looking at the amount of existing floor space actually used for that purpose and assessing whether that, together with the floor space in the proposed development, exceeds 5,000 square metres. The Direction is not intended to require consultation on a development which depends on aggregating the floor space of that development with the floor space of an existing development which is not being used (but could theoretically be used at some stage in the future) for office use. I understand that the Claimant accepts that she had no evidence to suggest that even taking the floor space of the proposed development, together with the area of the existing Probiotics developments on the former nursery site actually used for office use, the floor space would not exceed 5,000 square metres. In those circumstances, there was no obligation to consult the Secretary of State on the application for planning permission before granting it.

THE VALIDITY OF THE PLANNING CONDITION

33. Mr Jones Q.C. for the Claimant submitted that condition 8 was invalid as it was so ambiguous as to be unenforceable. He further submitted that the condition limiting the benefit of the permission to Priobitics (and a successor company) was not a valid condition as it did not fairly and reasonably relate to the development, was irrational and did not serve any planning purpose.

34. The law governing the exercise of the power to impose conditions is conveniently summarised in the judgments of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578. At page 599 Viscount Dilhorne said this:

"The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 572:

"Although the planning authorities are given very wide powers to impose ' such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

.....

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them...".

35. Advice about the circumstances in which conditions may be imposed is also given in Circular 11/95: Use of conditions in planning. That, as Mr Jones Q.C. recognises, is primarily an expression of view on the relevant law and how the law applies in particular circumstances rather than being guidance on matters of planning policy. The Circular itself recognises that it is a guide and is not intended to be definitive and that an authoritative statement of the law can only be made by the courts. At paragraph 92 and onwards, the Circular begins consideration of conditions restricting the occupancy of buildings and land. Under the heading "Occupancy: general considerations", paragraph 92 says this:

"Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission."

36. In dealing with personal permissions, that is the grant of planning permission which is limited to the benefit of a named person, paragraph 93 of the Circular says this:

"Unless the permission otherwise provides, planning permission runs with the land and it is seldom desirable to provide otherwise. There are occasions, however, where it is proposed exceptionally to grant permission for the use of a building or land for some purpose which would not normally be allowed at the site, simply because there are strong compassionate or other personal grounds for doing so. In such a case the permission should normally be made subject to a condition that it shall enure only for the benefit of a named person-usually the applicant (model condition 35): a permission personal to a company is inappropriate because its shares can be transferred to other person's without affecting the legal personality of the company. This condition will scarcely ever be justified in the case of a permission for the erection of a permanent building."

37. Paragraph 94 of the Circular deals with conditions which are intended to confine the occupation of commercial or industrial premises to local firms and generally indicates that such conditions are not

appropriate. Paragaph 95 says this:

"However, where the need of a local firm to expand is sufficiently exceptional to justify a departure from a general policy of restraint it will be essential to ensure that such a permission is not abused. It may be reasonable to impose a "local occupancy" condition in such circumstances, provided it is for a limited period (10 years is considered to be a suitable maximum), covers a large catchment area (for example, the area of the relevant county) and clearly defines the categories of persons or firms who may occupy the premises. Occupancy conditions should be imposed only where special planning grounds can be demonstrated and where the alternative would normally be to refuse the application. It would not normally be appropriate to impose such conditions on small buildings of less than 300 square metres of office floor space (or 500 square metres of industrial floor space). Occupancy conditions should not be imposed which provide for a system of vetting by the local planning authority or the use of a vague test such as "needing to be located in the area"."

38. Against that background, I turn to consider the proper interpretation of condition 8 and whether or not it is valid. I bear in mind the principles summarised in the judgment of Elias L.J. in *Hulme v Secretary of State for Communities and Local Government* [2011] EWCA Civ 638 at paragraphs 13 and 14:

"13 ....

a) The conditions must be construed in the context of the decision letter as a whole.

b) The conditions should be interpreted benevolently and not narrowly or strictly: see *Carter Commercial Development Limited v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) para 49, per Sullivan J, as he was.

c) A condition will be void for uncertainty only "if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results" per Lord Denning in *Fawcett Properties v Buckingham County* [1961] A.C. 636, 678. This seems to me to be an application of the benevolent construction principle.

d) There is no room for an implied condition .....

"14 Accordingly, whilst there must be a limit to the extent to which conditions should be rewritten to save them from invalidity, if they can be given a sensible and reasonable interpretation when read in context, they should be.

39. Two questions arise in relation to the interpretation of condition 8. The first concerns the fact that it states that the "The building hereby permitted shall only be carried out by Probitics". The question is whether it is concerned with the use of the building or whether it applies the erection of the building itself, or possibly, applies to both the erection and use of the building. Mr Whale, for the Defendant submits that read reasonably the condition is intended to relate only to the use of the building. In my judgment, that interpretation is correct. The condition, read as a whole, is intended to apply during the occupation of the land. That is more consistent with a condition concerning use (i.e. what is to happen while Probiotics is on the land) rather than a condition concerning the erection of the building. Furthermore, the reason for imposing the condition is that the Defendant wishes to control the uses on the application site. That again points to the condition being concerned with the use to be made of the application site.

40. The second question arises from the fact that the benefit of the planning permission is only to be enjoyed by Probiotics and any successor company. The question is what is meant by "any successor company". Mr Whale for the Defendant submitted that there were three possibilities. The condition could be dealing with situations where the name of Probiotics was changed. It could be dealing with situations where someone acquired the shares in the company. Or it could be dealing with a company which was the successor in title to the land. Mr Whale submitted that the phrase encompassed the first and second meanings. He submitted that the intention underlying the condition was to prevent a company which was unconnected with Probiotics from obtaining the benefit of the planning permission. Mr Jones QC, for the Claimant, submitted that the first two interpretations were in effect meaningless and that the ambiguity over what the condition meant had the result that the condition could not be enforced. For completeness, I note that a further possibility is that the phrase means a successor company in the sense of a company that takes over the business of Probiotics, i.e. a company that acquires its buildings, plant, other assets and staff. Neither Mr Whale nor Mr Jones QC submit that that is the correct meaning of condition 8.

41. It is not easy to give meaning to the words "any successor company" in condition 8. On a literal interpretation it would not include a situation where there was a change in the name of the company. The company would remain the same legal entity but would have a different name. Nor, on a literal interpretation,

would the phrase include a change in the share ownership. The company would remain the same legal entity but it would be owned by a different person. A "successor company" implies a different company from the original company and so would not be expected to embrace a situation where the legal entity does not change but its name changes or the ownership is transferred to a different person. Equally, the phrase is unlikely to mean to a successor in title to the land. Such a condition would not be necessary as planning permission would, in normal circumstances, pass with the land in any event. Further, if the condition was meant to include a successor in title to the land it could easily have said so. The reference to successor company must have been intended to have some other meaning.

42. I assume, for present purposes, that the condition could be read as meaning it applies to Probiotics and to any company or individual that acquires the shareholding in Probiotics, as Mr Whale submits. The question then arises as to whether or not such a condition is imposed for a planning purpose and fairly and reasonably relates to the development.

43. The reason given for the condition is that the local planning authority wishes to control the use of the land. In my judgment, however, a condition such as condition 8, will not enable the local planning authority to control the use of the land. Nor has any rational planning reason been advanced to restrict the benefit of the planning permission to Probiotics or a successor company.

44. The usual position is that planning permission is concerned with the use of the land, rather than the identity of the user, as paragraph 92 of the Circular recognises. First, there is nothing in condition 8 which enables the Defendant to limit the use to which the land may be put. Permission has been granted for any B1, B2 or B8 use. Limiting the benefit of the planning permission to Probiotics (or a successor company, whatever that means) does not enable the Defendant to impose any control on the use of the application site. It simply seeks to control the identity of the person carrying on the permitted use.

45. Secondly, no planning reasons explain why an unconnected company should not be allowed to use the building and land for the permitted purposes. The rationale underlying the grant of planning permission was that use of that site for employment purposes would be beneficial as it would generate jobs. It is difficult to see on what basis the use of the land for B1, B2 or B8 purposes by a different company, with different employees, would raise any planning issues.

46. It was suggested in argument that the condition would promote sustainability. The report to the committee does refer to the fact that there would be some benefit in employees from Probiotics not having to travel to the Lopenhead nursery site from other sites when considering sustainability in terms of travel journeys. But the condition does not, in fact, contribute to that purpose. Probiotics could use the application site for any B1, B2 or B8 purpose: it is not limited by the condition to using the application site in connection with its existing business on the other part of the nursery site (although that was the original rationale for its planning application).

47. The report also refers to the fact that if the application was for a general outline consent with no end users, it could be regarded as speculative and intended to obtain permission for the application site as a strategic employment site. That may explain why this application was granted. But once permission is granted, and it is accepted that a building should be erected on the application site, and that the site is suitable for B1, B2 or B8 use as that supports economic growth, there is no rational planning reason for saying that only Probiotics (or a company which buys the shares of Probiotics) should have the benefit of a planning permission to enable them to use the site for the permitted purposes.

48. Standing back from the details, the position is that planning permission is to be granted for the erection of a building. There will be a permanent structure on the application site, irrespective of the identity of the present user. The condition does not, and does not seek to, control any land use impact resulting from the presence of the building. The condition is said to be imposed to enable the Defendant to control the use of land but it does not in fact enable the Council to do so. The land may be used only for B1, B2 and B8 purposes. That will be the situation whether the land is occupied by Probiotics, a successor company (however interpreted) or some other company. No other sensible planning reason has been suggested to limit the range of person who are able to use the building for B1, B2 or B8 purposes.

49. For those reasons, in my judgment, however interpreted, condition 8 is invalid as it does not serve a planning purpose, it is not fairly and related to the development and is irrational. Both parties accepted that the condition was not capable of being severed from the planning permission and that the planning permission itself would therefore need to be quashed. The Council would then have to consider the application for planning permission. It could, in principle, grant planning permission without condition 8, or it could refuse planning permission. If the Defendant could identify some relevant planning purpose for limiting the permission, and drafted an appropriately worded condition, it could grant conditional planning permission. Those matters are ultimately planning issues for the Council to determine.

THE REASONS CHALLENGE

50. The Claimant contends that the Defendant has failed to give an adequate summary of reasons for the grant of planning permission or for the imposition of condition 8 as required by Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the Order"). That provided that where planning permission was granted, the notice shall

"i. include a summary of their reasons for the grant of planning permission

ii. include a summary of the policies and proposals in the development plan which are relevant to the decision to grant permission; and

iii. where the permission is granted subject to conditions state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the development plan which are relevant to the decision.

51. Summary reasons may be brief where the relevant committee agree with the reasoning of the report: see *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] J.P.L. 571 at paragraph 16. Article 31 of the Order has since been amended.

52. The summary reasons given in this case, in my judgment, clearly set out the reasons for granting the application. The proposed development would provide employment opportunities and by reason of its design, scale, siting and materials was considered to respect the character and appearance of the area. Similarly, the reason for condition 8 is clear. It was imposed as the Council wished to control the use of the site. For the reasons given above, the condition does not in fact achieve that aim and is invalid. However, the reason for imposing the condition is set out in the notice. There has not been any failure to give reasons contrary to Article 31 of the Order.

53. Furthermore, even if there were a breach of that Article, I would refuse to quash the decision to grant planning permission on this ground. Article 31 of the Order has since been amended. If the decision were quashed, planning permission could be granted again without the need to give summary reasons.

THE EIA REGULATIONS

54. The Claimant contends that the Defendant acted unlawfully in failing to treat the proposed development as EIA development. The Claimant submitted that the proposed development fell within Schedule 1 of the EIA Regulations. She contends that a precautionary approach should be taken and the Defendant could not be sure on the information available that the use of the site did not involve chemical conversion processes and, therefore, it could not rule out the possibility that the development fell within paragraph 6 of Schedule 1 to the EIA Regulations. Alternatively, the Claimant submits the decision that the proposed development would be unlikely to have significant environmental effects and so did not fall within Schedule 2 to the EIA regulations was unlawful.

55. The report relied upon the fact that both the Council (in its screening opinion) and the Secretary of State (in his direction) had formed the view that the proposed development was not EIA development. The report drew attention to the fact that the Council was able to review the position particularly if new information became available. However, the report noted that the view remained that an environmental statement was not required for the proposed development. The minutes of the committee meeting note that the committee members were given an overview of issues relating to, amongst other matters, the EIA issue. The natural inference is that the committee accepted the view expressed in the report when deciding to approve the officers' recommendation to grant planning permission without requiring submission of an environmental statement.

56. In my judgment, there is no basis for challenging the view that the proposed development did not fall within Schedule 1 to the EIA Regulations and no basis upon which the application of the precautionary principle meant that the Council had to proceed on the basis that it did fall within Schedule 1. The fact is that the point was expressly raised with the Secretary of State. He sought and obtained information from the planning consultants on the nature of the processes being used by Probiotics. In a long and detailed e-mail dated 13 June 2012, the consultants explained how Probiotics products were produced and why it was that no chemical conversion processes were used. The Secretary of State was entitled, in my judgment, to conclude in the light of that information that the proposed development did not fall within the definition of EIA development. The committee were entitled to proceed, as they did, on the basis that the proposed development did not fall within Schedule 1 to the development. Similarly, the committee were entitled to

proceed on the basis that the Council's screening opinion and the Secretary of State's direction was to the effect that the proposed development was not EIA development because although it fell within Schedule 2, it was unlikely to have significant environmental effects. The Secretary of State gave his reasons for that conclusion in his letter of 13 April 2012. The Council, in its screening opinion of 21 February 2012, had concluded that the impacts of the proposed development would not be significant. There is no basis for contending that the screening opinion or the direction are unlawful. The committee were therefore entitled to proceed, as they did, on the basis that the proposed development was not EIA development and no environmental statement was required.

THE LOCAL GOVERNMENT ISSUE

57. The Claimant contends that there has been a breach of section 100B of the LGA in that the officers' report was not made available five clear days before the committee meeting of 24 April 2013 and that led to unfairness as the Claimant and third party objectors did not have the documents in time to make fully informed representations before the committee meeting on 24 April 2013. The Claimant also says that she was deprived of the opportunity to instruct an expert in relation to the screening direction.

58. First, on the evidence, there has been no breach of section 100B of the LGA. That provision requires that copies of a report shall be open to inspection by members of the public at the Council offices. There is simply no evidence from the Claimant that copies were unavailable at the offices. Secondly, the Claimant contends that she and her advisers relied upon electronic versions and the version on the Council's website was not legible. I accept the evidence of Mr Andrew Gunn, one of the Defendant's officers, on this matter. He says that the committee report had been uploaded in both Word and pdf formats onto the Council's planning website and that the Word version was legible but the pdf one was not. He further says that the report was also uploaded in both formats onto the committee meetings section of the Council website which is accessible by the public and both formats were legible. As a matter of fact, therefore, the officers' report was electronically available 5 days before the meeting. It is correct that the Claimant's solicitor e-mailed Mr Gunn on 18 April 2013 asking for an electronic copy as when he accessed the website the version was not legible. Mr Gunn replied apologising that the website was not working and saying he would report it and would send a copy electronically, which he did the next day. In fact, the website was working, as it subsequently transpired, and the Claimant's advisers could have accessed the report electronically.

59. Furthermore, there was no unfairness in the present case. Third party objectors could (and some did) make objections to the proposals. Those objections are summarised in the report. Third parties did have access to the officers' report and could have made further representations if they wished. Indeed, it is clear from the minutes of the meeting and the Claimant's consultant's own notes of the meeting that some individuals had commented on the report and those comments were referred to at the meeting. The Claimant, and her planning consultants, were well aware of the proposal and had been so for some months and had made detailed comments on it by letter dated 14 December 2012. The solicitor had corresponded with the Secretary of State about the EIA screening issues and had been told about the information provided by Probiotics in the Secretary of State's letter of 31 August 2012. The planning consultants set out further representations to the Council by letter dated 24 April 2013 and that information was relayed to the councillors at the meeting. The Claimant's planning consultant attended the meeting and was allowed to speak about the proposal. In my judgment, there was no breach of the relevant statutory requirements and no procedural unfairness in the present case.

CONCLUSION

60. In the circumstances, I grant permission to apply for permission for judicial review on all five grounds. I do not consider that the complaints in grounds 2, 3, 4 or 5 are established. There was no unlawful approach on the part of the Council to the grant of planning permission in this case, and this ground of challenge does not succeed. The Defendant did give an adequate summary of the reasons for its decision to grant planning permission. The Defendant did not act in breach of the EIA Regulations as there is no basis for challenging the decision that the development was not EIA development and that an environmental statement was not required. There was no breach of the statutory provisions governing access to copies of the report and no unfairness.

61. However, the complaint in ground 1 is, in my judgment, established. Condition 8 of the planning permission is invalid as it does not serve a planning purpose, is not fairly and reasonably related to the proposed development and is irrational. The condition is not capable of being severed from the planning permission and that the planning permission itself must therefore be quashed. The Council would then have to consider the application for planning permission and decide whether to grant planning permission without condition 8, or to refuse it, or to grant it but with an appropriately revised condition if it could identify a proper planning purpose for such a condition and the condition was otherwise valid.